

Supreme Court, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

78-949

EVELYN LOWITT,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE
DIVISION**

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On the Petition.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE
DIVISION**

Evelyn Lowitt petitions for a Writ of Certiorari to review the judgment of the Appellate Division of the Superior Court of New Jersey, affirming petitioner's judgment of conviction for murder and for conspiracy to commit murder.

Opinions Below

The opinion of the Appellate Division has not been officially reported (App. A. *infra*, pp. 1-4a). An order was

entered by the Supreme Court of New Jersey denying petitioner's petition for certification (App. B. *infra*, p. 5a). This order has not yet been officially reported.

Jurisdiction

The judgment of the Appellate Division affirming petitioner's conviction was entered on June 19, 1978. The order of the Supreme Court of New Jersey denying petitioner's petition for certification was entered on September 19, 1978. Petitioner's judgment of conviction was entered on November 24 and December 17, 1976 (App. C. *infra*, pp. 6-7a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Question Presented

Did the trial court's denial of petitioner's request for a short continuance to allow petitioner to secure the testimony of the only eyewitness to the murder with which the petitioner was charged violate the petitioner's right to present a defense, as guaranteed in the Compulsory Process Clause of the Sixth Amendment and in the Due Process Clause of the Fourteenth Amendment to the Constitution in view of the presence of the following factors:

(a) It was expected that the State would call the witness to testify during its case. The witness had testified at the trial of the other alleged co-conspirators and had been listed as a potential witness by the State;

(b) The witness had at one time during petitioner's trial been certified to be a material witness by the trial court;

(c) The whereabouts of the witness in Florida had been located;

(d) The statutory procedure to effectuate the witness' production at the trial had been commenced and the sheriff in Florida had advised petitioner's counsel that he anticipated serving said witness with appropriate papers the evening of the very day that the motion for a continuance was denied;

(e) The continuance would have at most been for only two trial days.

(f) The witness may have been able to corroborate petitioner's theory that the decedent was killed during a robbery attempt instead of by individuals hired to kill the decedent, as charged by the State;

(g) The heart of the State's case was based upon testimony from admitted accomplices, one of whom was not indicted and the other of whom testified against petitioner in exchange for the dismissal of the murder charge against him; and

(h) Petitioner testified and denied the charge against her.

Constitutional Provisions Involved

The principal constitutional provisions involved are the Sixth Amendment and Section 1 of the Fourteenth Amendment of the United States Constitution.

Amendment VI provides as follows:

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall be committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV, Section 1 provides as follows:

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner was charged with the July 5, 1975 murder of her husband, Oscar Lowitt, and with conspiring with O'Neal Davis and Sylvester Cholmondeley to murder her husband.

Cholmondeley and another alleged accomplice, Vanessa Williams, were tried and convicted in July 1976, on charges substantially the same as those brought against petitioner. O'Neal Davis was also indicted on charges of murder and conspiracy to commit murder. Davis pleaded guilty to the conspiracy charge and in return for the dismissal of the murder charge agreed to testify against Cholmondeley and Williams at their trial and against petitioner at her trial. O'Neal Davis and another alleged but unindicted conspirator, Bennie Lee Frazier, were the only two witnesses against petitioner.

A jury trial was held for petitioner on November 17, 18, 19, 22, 23 and 24, 1976. The jury returned a guilty verdict for first degree murder and for conspiracy. Petitioner was sentenced on November 24 to life imprisonment for the murder conviction. On December 17, 1976, petitioner was sentenced to a consecutive term of two to three years at the New Jersey Correctional Institution for Women at Clinton. After a brief period of incarceration, petitioner was admitted to bail by the Appellate Division and continued free on bail until October 24, 1978, at which time an order was entered by the Honorable William J. Brennan, Jr., Circuit Justice, denying petitioner's application to continue bail.

At the petitioner's trial, the State's theory was that she hired Cholmondeley and Davis to murder her husband because she was jealous of a purported affair he was having in Florida with Miss Marilyn Kelly. Petitioner testified and denied the charges against her. Petitioner's theory was essentially that her husband was murdered during a robbery.

There was only one known eyewitness to the shooting, an individual named Manuel Ceden. Petitioner fully expected that Ceden would be produced at the trial by the State. The State had called Ceden at the trial of Cholmondeley and Williams. Moreover, it named Ceden as its second potential witness on the list of names of possible witnesses provided to petitioner in pre-trial discovery. On the morning of Wednesday, November 17, 1976, at the time of jury selection, petitioner learned for the first time that Ceden would not be called by the State. At that time, petitioner began a series of intensive efforts to secure the presence of Ceden at the trial (TC30-11 to 34-1).*

* TC refers to transcript of request for continuance.

At approximately 5:00 p.m. on Thursday, November 18, 1976, the trial judge signed a certification pursuant to New Jersey's Act to Secure the Attendance of Witnesses from without the State in Criminal Proceedings, N.J.S.A. 2A:81-18, *et seq.*, in which he certified that "Manuel Felix Cedenó is a material and necessary witness in the matter of the State of New Jersey vs Evelyn Lowitt and that his presence in New Jersey will be required November 23 and 24, 1976 . . ." A defense attorney left for Florida where an order was entered on November 19, 1976, by a Circuit Court Judge in Broward County requiring Cedenó to show cause why he should not be compelled to appear and testify at petitioner's trial. During the course of the trial the Court was informed that this order was obtained (TC34-1 to 36-10).

Considerable difficulty was encountered in locating Cedenó. On November 22, 1976, the Florida order was extended to run through the period ending on Friday, November 26, 1976 (TC37-8 to 38-24). Because of the continuing difficulty in locating Cedenó, petitioner moved, on the afternoon of Tuesday, November 23, 1976, to continue the trial until Monday, November 29, 1976, so that Cedenó could be produced as a witness (TC2-6 to 9).

The trial court heard lengthy argument on this request (TC2-6 to 43-8). During the course of the argument, a brief recess was taken after which petitioner's counsel informed the trial court that they had just spoken with the first deputy sheriff of Broward County and that the sheriff said that he knew where Cedenó was living, that he knew that Cedenó had not left the area, and that he expected to serve Cedenó with the court order that evening "without fail" (TC41-1 to 43-8). Nevertheless, the trial court then denied the request for a continuance (TC43-56).

In denying the continuance request, the trial judge stated that he doubted whether Cedenó was actually a

material witness because he could not offer any direct evidence as to defendant's guilt (TC43-11 to 19). The trial judge said that he was "not satisfied that" Cedenó "could ever be produced" and that he would not continue the matter until the following Monday without any such "guarantee". He also noted that he had observed the demeanor of Cedenó when Cedenó testified at the trial of Cholmondeley and Williams and that he believed that Cedenó would not readily comply with the order to appear in New Jersey (TC53-23 to 56-14).

After the trial court denied petitioner's request for a continuance, the trial resumed. On the following day, Wednesday, November 24, 1976, summations and the trial court's charge were delivered, and the jury verdict was rendered. An appeal for petitioner's conviction was filed with the Appellate Division of the Superior Court of New Jersey. In Point I of petitioner's brief to the Appellate Division, she made the following argument:

"The trial court's refusal to grant the motion for a continuance to allow defendant [the petitioner herein] to obtain the testimony of Manuel Cedenó constituted a violation of the defendant's constitutional right to present a defense and was a prejudicial abuse of discretion."

Petitioner based this point upon her rights as set forth in the Compulsory Process Clause of the Sixth Amendment and in the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The Appellate Division found this contention was "clearly without merit". (See App. A. *infra*, p. 3a).

Upon the Appellate Division's affirmance of her judgment of conviction, petitioner filed a petition for certification in the Supreme Court of New Jersey. In that peti-

tion, petitioner again argued that under the circumstances of the within case, petitioner's constitutional right to present a defense was violated by the trial court's refusal to grant a short continuance for the purpose of securing the attendance at the trial of the sole eyewitness to the murder. That petition was denied by the Supreme Court of New Jersey.

REASONS FOR GRANTING THE WRIT

This case embraces an issue which has been largely unexplored by this Court and other courts throughout the country—the constitutional dimension which is involved in every criminal defendant's request for a continuance. This issue has never been specifically addressed by this Court. Furthermore, petitioner respectfully submits that the decision of the court below is not in accord with other decisions of this Court which bear on the issue involved herein.

The Court has consistently held that an accused's right to present a defense is constitutionally protected by the guarantee of compulsory process for the production of witnesses, as set forth in the Sixth Amendment, and by the Due Process Clause contained in the Fourteenth Amendment. *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 338 U.S. 14; *Faretta v. California*, 442 U.S. 806. This Court has found that the right to present a defense is fundamental, *Chambers v. Mississippi*, *supra*, 410 U.S. at 302, and thus it can be infringed upon only by governmental interests which are of a compelling nature.

There can be no doubt that the scheduling of criminal trials can have a great impact upon an accused's ability to present a defense. Consequently, there has developed

a line of decisions derived from the above principles reflecting the fact that requests for reasonable continuances now possess a constitutional dimension. See *People v. Foy*, 32 N.Y. 2d 473, 299 N.E. 2d 664, 346 N.Y.S. 2d 245 (1973); Clinton, "The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials", 9 Indiana L. Rev. 711, 850 (1976).

In *Foy*, after the State rested, the defendant sought an adjournment in order to secure the attendance of an alibi witness, who had been present in the courtroom on the previous day but who had been unable to take another day off from his job. The trial judge denied the request for the continuance. On the appeal the State argued that the witness' testimony was not material to the alibi defense and that defendant had not made a diligent effort to guarantee the witness' presence. The appellate court stated that although the State's argument had some merit, that the trial judge's discretion in deciding whether or not to grant an adjournment is to be narrowly construed when a delay is requested in order to protect fundamental rights. The *Foy* Court cited *Chambers v. Mississippi*, *supra*, for the principle that the right of an accused to present witnesses in his own defense is one of our most fundamental rights and concluded that the denial of the motion for a continuance deprived the defendant of that right.

As described above, there was only one witness, Manuel Cedeno, to the shooting of the decedent in the instant matter. When it was discovered at the time of the jury selection that the witness would not be called by the State, despite the fact that he had testified for the State at the trial of Williams and Cholmondeley and had been named as a possible witness by the State on pre-trial discovery, petitioner began a series of intensive efforts to obtain the

presence of Cedenó at the trial. Cedenó's presence was obviously essential because his observations could possibly have established that the decedent was shot during a robbery, as petitioner insisted, instead of pursuant to a pre-arranged plan allegedly initiated by petitioner. The importance of this testimony cannot be overstated in view of the fact that the State's case rested upon the testimony of admitted accomplices whose testimony was denied by petitioner. One of these accomplices was not indicted and the murder charge against the other accomplice was dismissed in exchange for his testimony.

During petitioner's trial, she moved for a continuance in the afternoon of Tuesday, November 23, 1976, until Monday, November 29, 1976 so that she could be certain that she had sufficient time to secure the presence of Cedenó, who the trial judge had certified as a material witness. Despite the fact that defense counsel informed the trial judge that they had been advised by the deputy sheriff of Broward County, Florida, that Cedenó should be served that evening with the appropriate papers, the trial judge denied the request for the continuance. In so doing, the trial judge stated that he had already observed Cedenó at Cholmondeley's previous trial, which was not attended by petitioner or her counsel, and that he believed that Cedenó would not willingly return to New Jersey.

If, in fact, there had been a continuance to Monday, November 29, 1976, this would have involved, at most, a delay of two trial days since Thursday, November 25, 1976 was Thanksgiving. Surely the delay of two days was insignificant when balanced against the defendant's fundamental constitutional right in the context of a murder trial where she faced and received a sentence of life in prison. This is particularly true in view of the inherently weak testimony against her.

This Court has never squarely ruled upon the question raised in this petition. Furthermore, petitioner respectfully submits that the courts below have rendered a decision which was not in accord with the fundamental principles set forth in the *Chambers*, *Washington* and *Faretta* decisions, as applied in *People v. Foy*, *supra*.

Hence, petitioner respectfully submits that this is an appropriate case for this Court to consider the application of the above principles to her request for a continuance. It should be emphasized that the issue raised by petitioner is one which affects all requests for continuances in criminal trials throughout this country. By granting this petition, the Court will be able to consider the issue not only as it applies in the case at bar, but it will also have the opportunity to set guidelines for future actions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JOEL D. SIEGAL,
Counsel for Petitioner.

HELLRING, LINDEMAN, GOLDSTEIN
& SIEGAL,
Attorneys for Petitioner.

CHARLES ORANSKY,
On the Petition.

[APPENDICES FOLLOW]

APPENDIX A

**Opinion of the Superior Court of New Jersey,
Appellate Division**

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-1081-76

STATE OF NEW JERSEY,

Plaintiff-Respondent,

—VS.—

EVELYN LOWITT,

Defendant-Appellant.

Argued: May 30, 1978.

Decided: June 19, 1978.

Before Judges Fritz, Ard and Gaulkin.

On appeal from the Superior Court of New Jersey,
Law Division, Monmouth County.

Mr. Joel D. Siegal argued the cause for the appellant
(Messrs. Hellring, Lindeman, Goldstein & Siegal,
attorneys; Mr. Charles Oransky on the brief).

Ms. Sara A. Friedman, Deputy Attorney General,
argued the cause for respondent (Mr. John J. Deg-
nan, Attorney General of New Jersey, attorney).

PER CURIAM

Appendix A

Defendant Evelyn Lowitt was convicted by a jury of first degree murder of her husband (N.J.S.A. 2A:113-1 and 2A:113-2) and conspiracy to murder him (N.J.S.A. 2A:98-1). She was sentenced to life imprisonment on the murder conviction and to a consecutive term of two to three years on the conspiracy conviction. On this appeal she asserts the following:

- (1) The trial court's refusal to grant the motion for a continuance to allow defendant to obtain the testimony of Manuel Cedenio constituted a violation of defendant's constitutional right to present a defense and was a prejudicial abuse of discretion.
- (2) The trial court committed reversible error by admitting statements by Frazier and Davis about defendant's alleged request of Frazier that he buy defendant a gun five years before the date of the murder.
- (3) Defendant was deprived of her constitutional rights to present a defense and to cross-examine and confront the witnesses against her by the trial court's limitation of the cross-examinations of Davis and Kelly.
- (4) The trial court deprived defendant of her right to a fair trial by mistreating defense counsel in front of the jury.
- (5) Defendant was denied her right to a fair trial because of the statements made by the assistant prosecutor (raised in part below).
- (6) Prejudicial error was committed when the State was permitted to introduce hearsay testimony concerning defendant's alleged emotional state (raised in part below).

Appendix A

- (7) The cumulative effect of the trial court's errors is so great as to require a reversal.
- (8) Defendant was improperly sentenced to a consecutive prison term for her conviction for conspiracy to commit murder.

We have reviewed these contentions in the light of the entire record, and find all of them to be clearly without merit. R. 2:11-3(e)(2).

In a supplemental memorandum, defendant further urges error in the trial court's permitting the State to elicit from its witness Davis that he had pleaded guilty to conspiracy to murder defendant's husband. The assertion of error was not made below, but is advanced here on the basis of *State v. Stefanelli*, 153 N.J.Super. 452 (App. Div.), certif. granted 75 N.J. 4 (1977), decided after the trial was completed. Defendant claims that from the proof of Davis' plea of guilty to the very conspiracy alleged against defendant the jury "could not help but draw the inference that because one party pleaded to a conspiracy that the conspiracy actually existed."

In *Stefanelli* the court noted that the prosecutor had argued to the jury that they ought to believe the testimony of one Cicala, who had pleaded to the same conspiracy charged against Stefanelli; to disbelieve him, the prosecutor said, would mean that Cicala had "pleaded guilty to something that didn't happen." This argument, the court concluded, made it "fairly apparent that the testimony of Cicala with respect to the guilty plea was used for the purpose of impressing the jurors of the existence of the conspiracy." 153 N.J.Super. at 459. That improper use, which was not corrected by any instruction of the trial court, was found to be prejudicial error.

Appendix A

In the present case, the record carries no suggestion that the State's introduction of Davis' plea was used for any purpose other than to disclose a criminal conviction which might bear on Davis' credibility as a witness. The propriety of that use of the conviction is beyond question. See N.J.S.A. 2A:81-12; *Evid. R. 20*; *State v. Sands*, — N.J. — (1978); *State v. Holley*, 34 N.J. 9, 13, cert. den. 368 U.S. 854, 82 Sup. Ct. 89, 7 L.Ed. 51 (1961). Moreover the trial judge below specifically instructed the jury, both immediately upon Davis' acknowledgement of his plea and in the charge at the close of all the evidence, that his plea was to be considered only as bearing upon his credibility as a witness. Proof of Davis' plea having been offered for and limited to a proper purpose, its admission was not error.

The judgment of conviction is affirmed.

APPENDIX B

**Order Entered by the Supreme Court of New Jersey
Denying Petition for Certification**

SUPREME COURT OF NEW JERSEY

C-1 SEPTEMBER TERM 1978

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EVELYN LOWITT,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 19th day of September, 1978.

STEPHEN W. GOUNAUD
Clerk

APPENDIX C**Judgment of Conviction Entered by the Trial Court**

(Filed—December 17, 1976)

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY—LAW DIVISION

(Criminal)

Indictment No. 1510-75
(cts. 1, 2)

STATE OF NEW JERSEY,

vs.

EVELYN LOWITT,

Defendant.

The defendant being charged on June 23, 1976, on Indictment No. 1510-75, for the crimes of Murder (N.J.S. 2A:113-1 and N.J.S. 2A:113-2); (ct. 1); Conspire to Commit Murder (N.J.S. 2A:98-1) (ct. 2); and the defendant on July 1, 1975, having entered a plea of Not Guilty, and thereafter on November 17, 18, 19, 22, 23, and 24, 1976, having been tried with a Jury and a verdict of Guilty as to each of counts one and two of the Indictment having been rendered on November 24, 1976;

Appendix C

It is, therefore, on November 24, 1976;

ORDERED and ADJUDGED that the defendant be and is hereby sentenced to the New Jersey Correctional Institution for Women at Clinton for the rest of her natural life on count one of the Indictment. (Murder); and

It is, therefore, on December 17, 1976;

ORDERED and ADJUDGED that the defendant be and is hereby sentenced to the New Jersey Correctional Institution for Women at Clinton for a term of not less than two years and not more than three years on count two of the Indictment to run consecutively to Life sentence now being served. No credit.

REASONS FOR SENTENCE IMPOSED: Any lesser punishment would deprecate the seriousness of the crimes committed; the defendant is in need of correctional services that can be provided effective only in an institutional setting, and such services are reasonably available; imprisonment of some who had done what this defendant did is necessary to achieve socially justified deterrent purposes, and the punishment of this defendant is an appropriate vehicle to that end.

LOUIS R. AIKINS
Judge, Superior Court

Entered:

JOHN R. FIORINO
County Clerk

December 17, 1976